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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1119

INDIANA EMPLOYMENT SECURITY DIVISION, JOHN F. COPPES, individually and as Director of the Indiana Employment Security Division; VAN SMITH, MAX WRIGHT, and ALBERT SUMMERS, individually and as members of the Indiana Employment Security Board, KENNETH M. SWAIN, individually and as Manager of the Fort Wayne Branch of the Indiana Employment Security Division,

Appellants,

vs.

ESSIE B. BURNEY,

Appellee.

Brief for the State of California as Amicus Curiae

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SUBJECT INDEX

	Page
Interest of Amicus	1
The Indiana Procedures for Determining Weekly Claims Assure Fairness to the Claimant	3
Since the Termination of Benefits Is Accomplished Pursuant to Due Process, Benefits Are No Longer Due	7
Conclusion	13

TABLE OF AUTHORITIES CITED

Cases

Pages

Ahern v. Board of Education, 327 F.Supp. 1391 (D. Neb. 1971) 13

Cafeteria & Restaurant Workers Union v. McElroy, 376 U.S. 886 (1961) 13

California Department of Human Resources Development v. Crow, Ninth Circuit #26749, 325 F.Supp. 1314 (N.D.Cal. 1970) 2, 3, 8

California Department of Human Resources Development v. Java, 402 U.S. 121 (1971) 3, 5, 6, 7, 13

Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir. 1961) 9, 13

FCC v. WJR, 337 U.S. 265 (1948) 13

Freeman v. Gould Special School District, 405 F.2d 1153 (8th Cir. 1969) 13

Goldberg v. Kelly, 397 U.S. 254 (1970) 8, 9, 10, 13

New York State Department of Labor v. Torres, 333 F.Supp. 341 (S.D. N.Y. 1971), affirmed ..... U.S. ..... (February 23, 1972) 6

Richardson v. Perales, 402 U.S. 389 (1971) 13

Richardson v. Wright, ... U.S. ....., 92 S.Ct. 788, 797, 31 L.Ed.2d 151 (1972) 2, 12, 13

Rivas v. Cozens, 327 F.Supp. 867 (N.D.Cal. 1971) 13

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) 13

United States v. Barcley, 452 F.2d 930 (8th Cir. 1971).. 9

Wheeler v. Vermont, 335 F.Supp. 856 (D.Vt. 1972) 8, 11

Woodbury v. McKinnon, 447 F.2d 839 (5th Cir 1971).... 12

STATUTES

Page

California Unemployment Insurance Code, section 1253 6

District of Columbia Unemployment Compensation Act, Public Act No. 386, 74th Cong., as amended by Public Law 87-424 6

OTHER AUTHORITIES

Handbook of Unemployment Financial Data, 1938-1970 (1971), U.S. Department of Labor, Manpower Administration 2

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I

INTEREST OF AMICUS

This case concerns the validity of certain statutes and regulations utilized by the State of Indiana to administer its unemployment insurance program. The claimants are persons who were initially ruled eligible for unemployment insurance benefits, but who thereafter failed to qualify when seeking to prove eligibility for a particular week.

In brief, the Indiana procedure requires a claimant to present facts for each week that he claims benefits, which show that he has been available for work, has not refused suitable work, did not in fact work, etc. These facts are evaluated following administrative procedures which, while they do not amount to a judicial type hearing, nevertheless afford a claimant full due process. The California statutes and procedures are virtually identical to those employed in Indiana. See footnote 3, *infra.*

The impact of this court's decision in the instant case, however, will be greater on California than on Indiana or for that matter than on most states of the Union. California processes and pays about 15 percent of the nation's unemployment insurance claims.[1] In 1969, in California alone, there were some 116,000 claimants who would fall into the class of plaintiffs here. We estimate that the financial impact on the State of California, should plaintiffs prevail here, would be in the neighborhood of $50 million per year, including unrecoverable benefits paid to ineligible recipients and increased administrative costs.[2]

California's interest becomes even more pressing because of the pendency of *California Department of Human Resources Development v. Crow,* Ninth Circuit # 26749. In the latter case a single Federal District Court judge examined the California procedures in the area under consideration here and ruled that they violated due process.

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1. Handbook of Unemployment Financial Data, 1938-1970 (1971), U.S. Department of Labor, Manpower Administration.

2. It is extremely difficult to estimate precisely the dollar amounts involved in cases of this type. We are not unmindful of the fact that this court has questioned such estimates in the past. See dissenting opinion of Justice Brennan in *Richardson v. Wright,* ..... U.S. ....., 92 S.Ct. 788, 797, 31 L.Ed.2d 151 (1972); nevertheless we believe the figure set forth at least reflects the correct order of magnitude.

325 F.Supp. 1314 (N.D.Cal. 1970). The Department appealed to the Ninth Circuit but before the matter was argued in that court, this court agreed to hear the instant case. Because of the similarity between this case and *Crow*, we petitioned this court for certiorari in *Crow*, at the same time asking that *Crow* be consolidated with this case. Our petition for certiorari and our motion to expedite and consolidate were denied. Oral argument on *Crow* was thereafter had in the Ninth Circuit and on July 17 that court filed the following order,

> "Submission of this case for decision is postponed pending action by the Supreme Court of the United States in the case of *Indiana Employment Security Division v. Burney*, 172, ... U.S. ....., or until further order by the court."

Thus, this court's decision here, whether based on the Social Security Act or on due process considerations, will have a crucial effect on the Ninth Circuit's disposition of the appeal in *Crow*.

THE INDIANA PROCEDURES FOR DETERMINING WEEKLY CLAIMS ASSURE FAIRNESS TO THE CLAIMANT

When a claimant initially applies for unemployment insurance benefits, the procedures used by the Indiana Department of Employment Security are essentially those which were set forth by this court in *California Department of Human Resources Development v. Java*, 402 U.S. 121 (1971).[3] This court's summary of the procedures is as follows:

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3. While we do not have access to the Indiana Department of Employment Security Manual, plaintiffs have conceded that the procedures are identical to those described by this court in *Java*. See plaintiff's motion to affirm, p. 3, fn. 2. Hence, while the discussion on this point will be in the context of California procedures, the relevance to Indiana is manifest.

"A claimant, appearing at an unemployment insurance office to assert a claim initially is asked to fill out forms which, taken together, indicate the basis of the claim, the name of the claimant's previous employer, the reason for his unemployment, his work experience, etc. The claimant is asked to return to the office three weeks later for the purpose of receiving an Eligibility Benefits Rights Interview. The issue most frequently disputed, the claimant's reason for termination of employment, is answered on Form DE 1101, and the Department immediately sends copies of this form to the affected employer for verification. Meanwhile the employer is asked to furnish, within 10 days, 'any facts then known which may affect the claimant's eligibility for benefits.' . . . If the employer challenges eligibility, the claimant may then be asked to complete Form DE 4935, which asks for detailed information about the termination of claimant's previous job. The interviewer has, . . . the 'responsibility to seek from any source the facts required to make a prompt and proper determination of eligibility.' . . . 'Whenever information submitted is not clearly adequate to substantiate a decision, the Department has an obligation to seek the necessary information.' . . . This clearly contemplates inquiry to the latest employer, among others.

"The claimant then appears for his interview. At the interview, the eligibility interviewer reviews available documents, makes certain that required forms have been completed, and clarifies or verifies any questionable statements. If there are inconsistent facts or questions as to eligibility, the claimant is asked to explain and offer his version of facts.

"The interviewer is instructed to make telephone contact with other parties, including the latest employer, at the time of the interview, if possible. . . . Interested persons, including the employer, are allowed to confirm, contradict, explain, or present any relevant evidence. . . .

> "The eligibility interviewer must then consider all the evidence and make a determination as to eligibility. Normally, the determination is made at the conclusion of the interview. . . . However, if necessary to obtain information by mail from any source, the determination may be placed in suspense for 10 days after the date of interview, or, if no response is received, no later than claimant's next report day. . . ."

This court ruled that this interview procedure is the critical determination made by the Department, observing that all parties had notice and an opportunity to be heard. Hence, the court reasoned, if the Department makes a finding of eligibility following the utilization of the described procedures, that finding should be implemented immediately. The court stated that payments were due when the only administrative determination outstanding was a finding of eligibility. An automatic suspension of such benefits merely because an employer has filed an appeal would violate the Social Security Act.

In the instant case, we are not concerned with the circumstances surrounding the initial finding of eligibility.[4] Mrs. Burney had already been found eligible initially and benefits became "due." We would point out, however, that the mere fact that she was found initially eligible did not mean that benefits would continue to be due, that she would automatically qualify for benefits from week to week. She could not sit back in otiose complacency and simply wait for her weekly check. Quite the contrary. In order to qualify for weekly benefits after the initial finding

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4. We are here only concerned with the plaintiff Burney. We believe that the lower court correctly decided that the Indiana procedures were violative of *Java* insofar as they were used to deny benefits to plaintiff Hiatt.

of eligibility, she was required to fulfill weekly obligations. She was required to undertake affirmative acts. Each week she was required to search for suitable work, to be available for work, to accept any valid offer of work, etc. These weekly claims are individual and discrete.[5] Each is based on the conduct of the claimant during the week for which she seeks benefits. These weekly determinations are obviously made on the basis of new factual circumstances which could not have been considered at the original eligibility interview. *New York State Department of Labor v. Torres,* 333 F.Supp. 341 (S.D. N.Y. 1971), affirmed ..... U. S. ..... (February 23, 1972).

Unfortunately, the lower court here has lumped these two types of determinations together, failing utterly to perceive the critical distinction between them. Slip Opinion 9. The importance of the distinction is apparent. In *Java,* the interviewer had ruled initially that the claimant was eligible, thus triggering the commencement of benefit payments. Here the interviewer ruled that the claimant was *ineligible* for a particular week. In both cases, the claimant had the benefit of comprehensive and fair administrative procedures.[6] The difference is that in *Java* the Department was compelled to pay because the only outstanding determi-

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5. For example, section 1253 of the California Unemployment Insurance Code states, "An unemployed individual is eligible for unemployment compensation benefits with respect to *any week* only if the Director finds that: (a) a claim for benefits with respect to *that week* has been made in accordance with authorized regulations . . . [etc.]" (Emphasis added.) The Legislature could hardly be more explicit. Similar language was enacted by Congress in the District of Columbia. See District of Columbia Unemployment Compensation Act, Public Act No. 386, 74th Cong., as amended by Public Law 87-424.

6. The procedures used to decide initial eligibility are essentially the same as those used to decide individual weekly claims. The forms are different and the inquiry is different but the procedures used to arrive at an administrative decision are the same.

nation was one of *eligibility*. Here, however, following utilization of the same procedures, the Department concluded that the claimant was *ineligible*. Surely, under the principles of *Java,* where the only administrative determination is one of ineligibility, payments cannot be said to be due. It would be grossly unfair to permit a claimant to rely on the procedures as determinative when they result in a finding in his favor and to permit him to reject them as inadequate when the decision goes against him.

SINCE THE TERMINATION OF BENEFITS IS ACCOMPLISHED PURSUANT TO DUE PROCESS, BENEFITS ARE NO LONGER DUE

Mrs. Burney contends that once she has crossed the threshold of initial eligibility, the weekly examinations of her activity are merely part of one continuous claim. If that is so, then, goes the argument, before that continuing claim may be terminated in any particular week, a full hearing must be held. Mrs. Burney is wrong in her characterization. When she first applies for benefits, the Department must make an investigation entirely different from the one conducted at her subsequent weekly claims interviews. The initial eligibility examination concerns the reason she left her last employment, whether she was in a covered employment, whether she had adequate earnings in her base period, and similar factors. The weekly claims questionnaire, by contrast, generally seeks information only from the claimant directly. It asks whether the claimant worked during the week for which she claims benefits, whether she turned down work, whether she was available for work, whether she was unable to work, whether she affirmatively looked for work.

We do not believe, however, that it is critical for us to establish that the weekly claims are, in fact, precisely what the statute denominates them, viz., separate claims relat-

ing to individual periods of one week. We may concede arguendo that the claims are simply part of one continuous claim. We may further concede that if we view the weekly claims in this fashion payments continue to be due *unless* they are terminated following a due process hearing.[7] But it is at this point that our concessions end. It is our position that the claimant in Mrs. Burney's circumstances is afforded full due process before a decision is made to deny or "suspend" her benefits. In this connection, *Goldberg v. Kelly,* 397 U.S. 254 (1970) is, of course, the landmark decision and in order properly to appreciate its scope, we must examine what rights were denied in *Goldberg* and contrast the factual situation in that case with the facts present in the instant case.

In *Goldberg,* when a caseworker had doubts about a claimant's eligibility, he interrogated the welfare recipient and thereafter made a recommendation of termination to his supervisor in the welfare department. The proposed decision to terminate was made by the supervisor *ex parte* and without prior notice to the recipient. The recipient was thereafter notified in writing that he had seven days within which he could submit a written statement in support of his own position and could ask that the Department's decision be reviewed at a higher level. These writ-

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7. The decision below was based solely on the Social Security Act. In our view, however, the question of whether benefits are "due" overlaps due process considerations. Hence, we feel compelled to deal with the due process problem.

We might note in passing that in *California Department of Human Resources Development v. Crow,* now pending in the Ninth Circuit, # ....., the District Court (one judge) invalidated the California procedures on constitutional grounds. And in *Wheeler v. Vermont,* 335 F.Supp. 856 (D.Vt. 1972), the District Court (three judges) set aside Vermont procedures on *both* statutory and constitutional grounds. As noted earlier, the Ninth Circuit has issued an order deferring decision in *Crow* pending this court's decision in the instant matter.

ten documents were then evaluated by an official in the Department and if the decision was made to terminate benefits, the recipient was simply sent notice of that decision. See 397 U.S. at 258-259. Thus, the recipient had no opportunity to appear personally or to present his case orally or to confront or cross-examine witnesses.

This contrasts sharply with the procedures available to claimants here. In this case, the claimant may make a personal appearance—indeed several personal appearances—if she so desires. Oral presentations are encouraged and are the rule. The only so-called right which is missing is the right to confront and cross-examine witnesses and even as to this right, the Department procedures provide an equivalent right which guarantees that the claimant may meet and rebut all statements adverse to her position.

In *Goldberg,* this court indicated its awareness of the necessity of having procedures which can accommodate a huge administrative caseload while at the same time assuring speedy resolution of questions of eligibility. 397 U.S. at 267. Accordingly, the court stated:

> "We wish to add that we, no less than the dissenters, recognize the importance of not imposing upon the states or the federal government in this developing field of law any procedural requirements beyond those demanded by rudimentary due process." 397 U.S. at 267.

The question is then what procedural safeguards must be made available to Mrs. Burney in order that she be guaranteed "rudimentary due process." Clearly a judicial trial-type hearing is not necessary. 397 U.S. at 266. *Dixon v. Alabama State Board of Education,* 294 F.2d 150 (5th Cir. 1961); *United States v. Barcley,* 452 F.2d 930 (8th Cir. 1971).

From a reading of this court's opinion in *Goldberg*, it would appear that basic due process must include at least the following:

1. The opportunity to be heard orally and in writing at a meaningful stage in the proceedings.

2. The right to prior notice and time to prepare a defense.

3. The right to appear personally with or without counsel before the official who determines eligibility.

4. The right to have the decision made by an impartial decision-maker.

5. The right to confront and cross-examine adverse witnesses.

We believe that the elements outlined above are all satisfied although the right to cross-examination is not afforded in its traditional form.

1. The Department affords the claimant an opportunity to be heard at a meaningful time and place. She is examined first by a determinations interviewer and any questions resulting from the information the claimant has provided concerning her activities during the prior week are elicited. At this stage, the interviewer has an obligation to solicit the claimant's point of view and to extract an explanation for any conduct which may lead to a disqualification. If it appears that documentary evidence—for example, a physician's statement—would support the claim, the claimant will be asked to submit it. Additionally, the claimant is invited to suggest witnesses to support his version of the facts. It should be noted that benefits of the doubt are resolved in favor of the claimant and the claimant does not have the burden of producing witnesses; the interviewer has the obligation of gathering evidence to support his decision.

2. When the claimant's explanation of whatever conduct may jeopardize his eligibility has the effect of dis-

qualifying her from benefits for that particular week, she is placed on notice that suspension of benefits will follow. If at this point the claimant desires more time or if the interviewer deems it necessary to acquire additional information, the decision on eligibility for the week in question is postponed.

3. Obviously, the claimant has the right to appear personally. Indeed, in most cases, she has the obligation of appearing personally. There may be more than one interview if the claimant wishes to come into the office and present additional information. The claimant is entitled to appear either with counsel or with a friend or representative (for example, a union representative). This opportunity is available at both the preliminary determination and the pre-appeal review stage.

4. The decision-maker hears the evidence and is impartial. The decision is made by the interviewer[8] purely on the basis of all the information available. If the claimant is dissatisfied with the determination by the initial interviewer, she can request further review and a "pre-appeal review" by a supervisor is conducted. The supervisor will interview the claimant, examine the records, obtain additional facts when necessary, and apply the law to the facts.

5. We come then to the matter of confrontation and cross-examination. While this right is not afforded the claimant in its conventional form, its equivalent is a standard part of the decision-making process.

Parenthetically, we would note there is usually no point to giving the claimant the opportunity to cross-examine. Generally the information upon which the determination is based comes from the claimant herself. For example, Mrs. Burney herself conceded that she would not accept the employment in question because of a transportation

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8. This key fact distinguishes this case from *Wheeler v. Vermont*, 335 F.Supp. 856, 860-861 (D.Vt. 1972).

problem. Appendix 31-32.[9] Thus there was no one to cross-examine. The claimant supplied facts which formed the basis for the Department's decision. No witnesses were required, nor was there any occasion for the claimant to meet adverse testimony by others. Cf. *Woodbury v. McKinnon*, 447 F.2d 839 (5th Cir. 1971).

There are, however, occasions where outside persons may be contacted. In that eventuality, the person is usually contacted while the claimant is present in the office. For example, suppose the claimant indicates that she may have turned down an offer of work. It may be appropriate for the Department to contact the firm which made the alleged offer to determine whether the offer was, in fact, one which the claimant was in a position to accept. Following telephone contact by the Department, the claimant will be told what was said by the putative employer and asked to explain or rebut. If anything, this procedure leans in favor of the claimant. She is given the last word, and may even be granted additional time within which to submit oral or documentary evidence to further support her version of the facts.

Thus the goal of cross-examination is accomplished: the claimant hears the evidence offered against her and is permitted to show that that evidence is lacking in accuracy or credibility.

The point is that not every conceivable set of circumstances justified hauling out the cumbersome machinery

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9. Mrs. Burney alleges that there are no buses running at 2 a.m. Accepting this as fact the Department, nevertheless, concluded that she was unavailable for work. Perhaps the Department was wrong in that conclusion but the salient point is that the conclusion was a legal one, not a factual determination. A full dress judicial type hearing would not have changed that conclusion; it would merely have elicited the information that buses weren't available. The *legal* conclusion could only be tested on appeal. Cf. dissenting opinion of Justice Brennan in *Richardson v. Wright*, ... U.S. ....., 92 S.Ct. 788, 793, 31 L.Ed.2d 151 (1972).

which attends a judicial type hearing. If the essential elements of due process are present, the fact that the procedures utilized are administratively expedient should not prejudice their use. Little is gained by lavish adherence to labels such as cross-examination and confrontation. Those terms are flexible and have meaning only in context. *Cafeteria & Restaurant Workers Union v. McElroy*, 376 U.S. 886 (1961). Here that context is an administrative program which processes thousands of claims every week. We submit that the procedures used by Indiana and California and most other states are tailored to administrative necessity, while at the same time guaranteeing to claimants the due process to which they are entitled. See *Richardson v. Wright*, ...U.S. ....., 92 S.Ct. 788, 31 L.Ed.2d 151 (1972); *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961); *Richardson v. Perales*, 402 U.S. 389, 406-407 (1971); and *FCC v. WJR*, 337 U.S. 265 (1948). See particularly *Rivas v. Cozens*, 327 F.Supp. 867 (N.D.Cal. 1971), pending before this court, No. 71-5780, where a three-judge district panel ruled that a driver's license may be suspended without a prior hearing. The court in the latter case specifically distinguished *Sniadach*,[10] *Goldberg* and *Java*. Cf. *Freeman v. Gould Special School District*, 405 F.2d 1153 (8th Cir. 1969); *Ahern v. Board of Education*, 327 F.Supp. 1391 (D.Neb. 1971).

CONCLUSION

The Indiana procedures provide for payments when due within the meaning of the Social Security Act. But payments do not continue to be due irrespective of the acts of the claimant. The claimant must qualify each week, proving facts different from those involved in the finding of initial eligibility. These separate claims may be granted or denied

10. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

without a full hearing. If the court, however, chooses to view the weekly claims solely as part of one continuing claim, the procedures, nevertheless, must be held valid as they afford a claimant due process prior to suspension of benefit payments.

For the reasons stated, the District Court's decision should be reversed.

Dated: August 3, 1972

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